

**Beizer v Worms**

2008 NY Slip Op 30132(U)

January 11, 2008

Supreme Court, New York County

Docket Number: 0601182/2006

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **CAROL EDMEAD**  
J.S.C. Justice

PART 35

Harriet Beizer

INDEX NO. 601182/06

MOTION DATE 1/4/08

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

Victor A. Worms

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JAN 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted solely on the issue of liability; and it is further

ORDERED that the defendants shall appear for deposition within 30 days of service of this order with notice of entry; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

**CAROL EDMEAD**  
J.S.C.

Dated: 1/15/08

*[Signature]*  
CAROL EDMEAD  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
HARRIET BEIZER,

Plaintiff,

Index No. 601182/2006

-against-

VICTOR A. WORMS and  
V.A.W. ENTERPRISES, INC.,

Defendants.

-----X  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this breach of contract action, plaintiff Harriet Beizer (“plaintiff”) moves for summary judgment pursuant to CPLR 3211 (b),<sup>1</sup> together with interest, attorneys fees, and costs and disbursements.

Plaintiff owns a court reporting business. Defendant Victor A. Worms, an attorney, (“Mr. Worms”) represented plaintiff’s business in several claims filed by plaintiff against plaintiff’s customers for unpaid reporting services. It is undisputed that in June 2000, July 2000 and February 2003, plaintiff loaned defendants Mr. Worms and V.A.W. Enterprises, Inc. (collectively, “defendants”) \$46,000.00, \$3,000.00, and \$1,650.00, pursuant to three separate agreements. The first and last agreements provide for the recovery of reasonable attorneys fee in connection with proceedings commenced to recover monies due under the agreements, while the second agreement grants plaintiff “the right to enforce any common law rights” in the event of the defendants’ default thereunder.

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<sup>1</sup> The Court notes that CPLR 3211 addresses motion to dismiss, and thus, presumes this motion is pursuant to CPLR 3212 (b), which addresses motions for summary judgment.

It is also uncontested that defendants represented the plaintiff in various lawsuits commenced to recover monies owed to the plaintiff by plaintiff's customers pursuant to a retainer agreement.

Plaintiff contends that she received an interest payment from defendants in the amount of \$5,520.00, which was credited against the monies due under the agreements. Further, plaintiff applied \$6,250.00, which represented legal fees owed to defendants for legal services he performed in recovering monies on behalf of the plaintiff.

In support of summary judgment, plaintiff contends that defendants have not filed any counterclaim for monies due for legal services provided, and may seek arbitration or mediation for the recovery of any monies so due. Furthermore, defendants have not produced any documentary evidence to support his allegation that there may be additional monies owed to him for legal services rendered to the plaintiff. Moreover, defendants failed to complete Mr. Worms' deposition in this action. Plaintiff also incurred legal fees for prosecuting this action, in the amount of 30% of the balance due under the loans. The balance of the loans, together with interest at the rate of 5 ½% above the prime rate. Thus, defendants owe a collection fee to plaintiff's attorney of 30% of \$74,624, amounting to \$22,387.

In opposition, defendants argue that plaintiff failed to make a *prima facie* showing of entitlement to summary judgment. Further discovery in this action is necessary to determine the amount of money owed to the plaintiff. Defendants do not deny that plaintiff made certain loans to them. According to defendants, plaintiff and defendants "had an understanding and agreement that certain legal work performed by me [Mr. Worms] will be offset against the amount which I owed Ms. Beizer." Plaintiff acknowledges that the legal fees she owed defendants would be

offset against the amount of defendants' loans. Although plaintiff credited defendants \$6,500.00 for legal services defendants performed in one matter, defendants worked on various other matters for which plaintiff owes legal fees. Such matters include, *Beizer v Malhotra*, involving a trial and appeal, and *Beizer v Bonnie P. Josephs*, involving motion practice and a trial. Plaintiff failed to apply any credit against the amounts defendants owed for the legal services rendered in these matters. Additionally, plaintiff's complaint, which does not assert that a credit was applied towards defendants' loans, is inconsistent with plaintiff's affidavit, indicating otherwise. Nor is there any documentary proof indicating that defendants solely paid \$5,520.00, as it is possible that defendants paid more. Nor does plaintiff provide any admissible evidence as to what the rate of interest was for the relevant period of time; the schedule for the prevailing rates of interest which plaintiff provided, but acknowledged "cannot be represented to be 'accurate or complete,'" would never be admissible at trial, and thus, is insufficient to support summary judgment. Insufficient to raise an issue of fact as to liability, or that the loans were fully paid as required.

In reply, plaintiff adds that the schedule of the prevailing rates of interest was published by Bloomberg Financial Services, a respected financial reporting company. Further, defendants have not presented any bill or claim for any monies owed by plaintiff. Moreover, defendants' legal fees were contingent upon collection of monies for plaintiff and upon information and belief, none were collected, other than the \$6,500.00.

#### Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a

*prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*,

46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1<sup>st</sup> Dept 1998]).

The record establishes, and it is undisputed, that plaintiff loaned defendants \$46,000.00, \$3,000.00, and \$1,650.00, for a total sum of \$50,650.00, pursuant to three separate loan instruments. Further, there is no indication in the record, and defendants do not assert, that they have fully satisfied their loans to the plaintiff. Thus, plaintiff has established entitlement to summary judgment on the issue of liability (*see Red Apple Supermarkets, Inc. v. Malone & Hyde, Inc.*, 228 AD2d 176, 644 NYS2d 4 [1<sup>st</sup> Dept 1996]; *Maglich v Saxe, Bacon & Bolan, P.C.*, 97 AD2d 19, 468 NYS2d 618 [1<sup>st</sup> Dept 1983]).

It is also undisputed that plaintiff also engaged defendants to pursue breach of contract claims against plaintiff's customers, and that such legal services would operate as an offset to the amounts due under the loan agreements. However, an issue of fact exists as to the parties' understanding concerning the manner in which the legal services performed would impact the loan amounts due (*cf. Maglich v Saxe, Bacon & Bolan, P.C.*, 97 AD2d 19, 468 NYS2d 618 [1<sup>st</sup> Dept 1983] [holding that a contested claim for legal services, unliquidated and varying in amount and unrelated to plaintiff's claim, affords no defense to an action for unpaid loan so as to preclude the immediate entry of judgment thereon]; *see also Stigwood Organisation v Devon Co.*, 44 NY2d 922, 408 NYS2d 5]). While defendants maintain that they are entitled to an offset, based on the value of the legal services performed on behalf of the plaintiff, plaintiff, on the other hand, contends that defendants are entitled to the offset of such loans based on the amounts defendants

recovered on behalf of the plaintiff. Thus, issues of fact exist as to whether the parties' agreement to offset defendants' loans would include the value of defendants' services performed in connection with the cases, *Beizer v Malhotra* and *Beizer v Josephs*.

The issue of the amounts due under such loans cannot be resolved until a finding is made as to whether the parties agreed (1) to off-set the loans by the value of defendants' mere performance of legal services, or (2) to off-set the loans by the amount defendants recovered on behalf of the plaintiff. Once it the terms of the offset are defined, and the value of any such offset ascertained, if any, a determination can be made as to plaintiff's entitlement to monies under the loans, interest and attorneys' fees.

That the complaint does not allege a credit was applied is insufficient to raise an issue of fact as to liability. Further, defendants' contention that it is possible that they paid more than \$5,520.00 is insufficient to raise an issue of fact as to liability; whether defendants' made additional payments to the plaintiff is information within the possession of defendants, who failed to assert or substantiate that they made any additional payments to the plaintiff.

FILED  
JAN 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Based on the foregoing, it is hereby

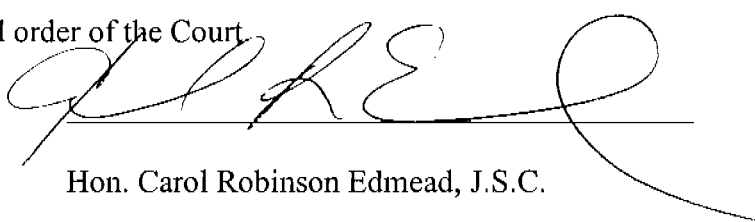
ORDERED that plaintiff's motion for summary judgment is granted solely on the issue of liability; and it is further

ORDERED that the defendants shall appear for deposition within 30 days of service of this order with notice of entry; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 11, 2008

  
Hon. Carol Robinson Edmead, J.S.C.